APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5198

KENNETH E. HARDY,
Plaintiff-Appellee,

v.

JEFFERSON COMMUNITY COLLEGE AND KENTUCKY COMMUNITY AND TECHNICAL COLLEGE SYSTEM,
Defendants,

MARY PAMELA BESSER AND RICHARD GREEN,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 99-00477--Charles R. Simpson III,
Chief District Judge.

Argued: June 8, 2001
Decided and Filed: August 15, 2001

Before: KEITH, NORRIS, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. Kenneth E. Hardy, a Caucasian adjunct instructor at Jefferson Community College, brought suit against the College, Kentucky Community and Technical College System, College President Richard Green, and former Acting Dean Mary Pamela Besser pursuant to 42 U.S.C. § 1983, alleging that the defendants retaliated against him for exercising his constitutionally protected right of free speech. Following a classroom discussion examining the impact of such oppressive and disparaging words as "nigger" and "bitch," one of Hardy's African-American students complained to her minister, a local civil-rights activist. When the minister threatened that African-American enrollment would decline unless the dispute was resolved to the satisfaction of the complaining student, Hardy's teaching contract was not renewed.

The district court dismissed all of Hardy's claims against the College, as well as against Green and Besser in their official capacities, but rejected Green's and Besser's contention that they were entitled to qualified immunity in their individual capacities as a matter of law. Green and Besser now challenge that decision on interlocutory appeal. For the reasons set forth below, we **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

In January of 1995, Jefferson Community College hired Hardy as an adjunct instructor to teach in its communications program. He was responsible for two courses, Basic Public Speaking and Introduction to Interpersonal Communication. The College continued to renew Hardy's teaching contract each semester thereafter. He received consistently

outstanding student evaluations and strong reviews from his superiors. In May of 1998, Hardy was informed that he would be assigned three sections during the upcoming fall semester, although he was not asked to sign a contract at that time.

During the summer semester of 1998, he was again teaching Introduction to Interpersonal Communication. His twenty-two students included nine African-Americans, one of Asian descent, and a foreign exchange student from Switzerland. On July 16, he presented his standard lecture on language and social constructivism, where the students examined how language is used to marginalize minorities and other oppressed groups in society. The lecture included a discussion and analysis of words that have historically served the interests of the dominant culture in which they arise. Hardy solicited from his students examples of such terms. Among their suggestions were the words "girl," "lady," "faggot," "nigger," and "bitch." According to Hardy and other members of the class, the discussion was academically and philosophically challenging. Almost every student participated in the exercise.

One African-American student, however, objected to the in-class use of the words "nigger" and "bitch," and complained to Hardy and his superiors. The student found the exercise to be in direct contravention of Hardy's stated policy prohibiting the use of offensive language in class. This policy was set forth in the written syllabus that Hardy distributed on the first day of class, which read in pertinent part as follows: "In order to make all class members comfortable enough to participate, there will be no abusive (i.e. sexist, racist, otherwise derogatory) language in discussion."

Although Hardy apologized to the complaining student for any discomfort that the class had caused her, the student contacted Reverend Louis Coleman, a local civil-rights

activist, to voice her objection to the gender and racial slurs used in the class. Coleman, in turn, arranged a meeting with College President Green and the student to make Green aware of the student's complaint and to ask that "corrective action be taken." During the meeting, Coleman informed Green that he would not "allow our kids to come to an institution and be berated with the 'N' word and the 'B' word."

On July 21, 1998, former Acting Dean Besser met with Hardy to discuss the student's concerns. She specifically asked why the word "nigger" was used in class when his syllabus forbade such racist or derogatory language. Although Hardy attempted to explain that this and other words were analyzed as illustrations of highly offensive, powerful language, and that it was not used in an "abusive" manner, Besser continued to challenge Hardy regarding the classroom discussion. Hardy then asked Besser if there was anything he could do to rectify the situation. Rather than responding to his question, she informed him that a "prominent citizen" representing the interests of the African-American community had become involved and had threatened to affect the school's already-declining enrollment if corrective action was not taken.

Hardy finished teaching the course as scheduled in the summer semester. On August 23, 1998, Dr. Denise Gray, the Assistant Dean of Students for the College, wrote Hardy to inform him that the matter had been resolved to the satisfaction of the complaining student. Around the same time, Besser left a message on Hardy's home answering machine stating that "there were no classes" for him to teach in the Fall 1998 semester.

At Hardy's request, Green and Besser met with Hardy to discuss the issue in early September of 1998. They informed him that the matter had been resolved to the stu-

dent's satisfaction, but they declined to elaborate further. Hardy was never again asked to teach at the College.

B. Procedural background

On July 23, 1999, Hardy filed suit pursuant to 42 U.S.C. § 1983, alleging that the defendants had violated his rights under the First and Fourteenth Amendments to the United States Constitution. Hardy's complaint contended that the defendants had retaliated against him for exercising his rights of free speech and academic freedom. He also asserted several state-law causes of action, including defamation, conspiracy, breach of contract, and tortious interference with his and the College's continuing business relationship.

The defendants filed a timely motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting various grounds for dismissal. First, the College, as well as Green and Besser in their official capacities, argued that Hardy's claims were barred by the Eleventh Amendment to the United States Constitution and by sovereign immunity as provided in Section 231 of the Kentucky Constitution. Because the College is an arm of the state of Kentucky, and because any judgment against either the College or Green and Besser in their official capacities would be paid out of the state treasury, the district court granted this portion of the defendants' motions, excepting only those claims praying solely for prospective injunctive relief.

Second, Green and Besser claimed that they were entitled to qualified immunity in their individual capacities because Hardy had no constitutional right to use the "N" word and the "B" word, and that they had the right to terminate him for using such language. The district court denied their motion, holding that Hardy's speech touched upon "a matter of public concern" and that a public employee's right to

speak on such matters has been clearly established by the Supreme Court. In a related ruling, the court denied the defendants' motion to dismiss Hardy's state-law conspiracy claim. Despite their argument that he had failed to allege any unlawful act that would support a conspiracy claim, the court held that, if Hardy could show that they had retaliated against him for exercising his constitutional rights, he would satisfy the state-law conspiracy requirement.

Finally, the district court determined that Hardy had failed to plead sufficient facts to support his Fourteenth Amendment equal-protection and procedural-due-process claims, or his state-law claims of defamation, tortious interference with a contractual relationship, and breach of contract. It therefore granted the defendants' motion to dismiss all of these latter claims.

Green and Besser then filed a motion to alter or amend the district court's ruling that they were not entitled to qualified immunity, asserting that "the right to free speech *in the classroom setting* is not clearly established." (Emphasis in original.) Again the district court denied their motion, finding the argument "to be a distinction without a difference." The court also denied Green's and Besser's motion to reconsider its ruling on Hardy's state-law conspiracy claim. Green and Besser have filed this interlocutory appeal to challenge the district court's denial of their qualified-immunity defense.

II. JURISDICTION

Under 28 U.S.C. § 1291, this court has jurisdiction to hear appeals from "final decisions" of the district court. As the Supreme Court has explained, however, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S.

511, 530 (1985). The Court emphasized, however, that appellate jurisdiction over these interlocutory appeals is confined to the "purely legal" question of "whether the facts alleged . . . support a claim of violation of clearly established law." *Id.* at 528 n.9. We therefore have jurisdiction over Green's and Besser's appeal so long as our review is confined to the "purely legal" question of whether the facts as alleged by Hardy show a violation of his clearly established rights.

III. ANALYSIS

A. Standard of review

The doctrine of qualified immunity shields government officials from liability, as well as from suit, so long as their official conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A district court must engage in a two-step inquiry when determining whether a state actor is entitled to qualified immunity. First, the court must ask whether the plaintiff in the civil action has demonstrated the violation of a constitutionally protected right. Green and Besser question whether Hardy's use of "racially derogatory and sexist language" in the classroom constituted speech protected by the First Amendment, thereby raising a question of law properly reviewable on interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 317 (1995) (holding that the denial of qualified immunity is reviewable on interlocutory appeal only if the case presents "abstract issues of law"). Second, the court must examine "whether the right is so 'clearly established' that a reasonable official would understand that what he is doing violates that right." *Brennan v. Township of Northville*, 78 F.3d 1152, 1154 (6th Cir. 1996) (citation omitted).

Although qualified immunity is typically addressed at the summary judgment stage of the case, the defense may be raised and considered on a motion to dismiss. The motion will be granted if the complaint fails to allege the violation of a clearly established constitutional right. *See Stemler v. City of Florence*, 126 F.3d 856, 866-67 (6th Cir. 1997). Whether the complaint alleges such a violation is a question of law which we review *de novo*, accepting the facts alleged in the complaint as true and drawing all reasonable inferences therefrom in the plaintiff's favor. *See Spurlock v. Satterfield*, 167 F.3d 995, 1000 (6th Cir. 1999).

B. The district court did not err in denying Green's and Besser's motion to dismiss on the basis of qualified immunity

In this appeal, Green and Besser raise two different issues for our review. First, they challenge the district court's holding that Hardy's in-class speech involved a matter of public concern, thus falling within the protections of the First Amendment. Second, they contend that reasonable officials could have disagreed on whether, and to what extent, Hardy's speech was constitutionally protected.

Green and Besser also maintain that Hardy's contract was not renewed because of his objectionable teaching methods, and that this case therefore involves nothing more than an internal employment dispute. In order for this court to retain jurisdiction, however, Green and Besser "must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to [Hardy's] case." *Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998). The facts as alleged by Hardy directly contravene this attempt to characterize the matter as "nothing more than an ordinary employment dispute." At the July 1998 meeting between Besser and Hardy, Besser questioned Hardy at length about the usage of the "N" word in his classroom discussion. Besser also allegedly informed

Hardy that if he "were not a white male, this would not be an issue." As such, we will not consider Green's and Besser's disputed version of the material facts in our analysis.

1. First Amendment retaliation claim

Hardy alleges that Green and Besser violated his First Amendment right to freedom of speech when they failed to renew his contract in retaliation for his in-class discussion of "socially controversial words." The district court found that the use of the racial and gender epithets in an academic context, designed to analyze the impact of these words upon societal relations, touched upon a matter of public concern and thus fell within the First Amendment's protection. Green and Besser contend, however, that Hardy's use of "racially vulgar words" presented no issue of public concern and therefore enjoyed no constitutional protection.

The Supreme Court has long held that a public employee retains his First Amendment right to comment on matters of public concern without fear of reprisal from the government as his employer. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (holding that a teacher's comments concerning school funding issues touched upon a matter of public concern and could not provide the basis for dismissal). Furthermore, an employee's untenured status will not defeat constitutional claims. *See Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (declaring that a professor's lack of tenure did not defeat the claim that the nonrenewal of his contract was in retaliation for the exercise of his constitutional right to free speech). A public employee may "establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977).

As a public employee, Hardy must show that (1) he was disciplined for speech that was directed toward an issue of public concern, and (2) his interest in speaking as he did outweighed the College's interest in regulating his speech. *See Pickering*, 391 U.S. at 568.

In *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court determined that the question of whether a public employee's speech is constitutionally protected turns upon the "public" or "private" nature of such speech. The distinction is based upon the principle that "speech on public issues occupies the highest rung of the heirarchy [sic] of First Amendment values, and is entitled to special protection." *Id.* at 145 (internal citation and quotation marks omitted).

To determine whether an employee's speech addresses a matter of public concern, the court must look to the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Speech that relates "to any matter of political, social, or other concern to the community" touches upon matters of public concern. *Id.* at 146. Furthermore, the court must determine "the *point* of the speech in question . . . [because] [c]ontroversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1187 (6th Cir. 1995) (emphasis in original) (internal quotation and citation omitted).

Relying on this court's recent decision in *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), Green and Besser argue that Hardy's use of "racially vulgar words" failed to touch upon a matter of public concern, and therefore was not entitled to protection under the First Amendment. The college professor in *Bonnell*, however, was disciplined for his gratuitous in-class use of the words "pussy," "cunt," and "fuck," which had given rise to a sexual harassment complaint filed by one of the professor's students. *Id.* at 803.

Because Bonnell's offensive language was "not germane to the subject matter," the court concluded that he did "not have a constitutional right to use [these terms] in a classroom setting." *Id.* at 820. Unlike Bonnell's frequent in-class use of gratuitous profanity and offensive language, however, Hardy's speech was germane to the subject matter of his lecture on the power and effect of language. The course was on interpersonal communications, and Hardy's speech was limited to an academic discussion of the words in question.

This case is similarly distinguishable from the facts in *Dambrot*, where the court held that the coach of a state university basketball team did not engage in protected speech when he used the word "nigger" during a locker-room peptalk. *See Dambrot*, 55 F.3d at 1187. The *Dambrot* court found it significant that "Dambrot's use of the N-word was intended to be motivational and was incidental to the message conveyed." *Id.* Dambrot's argument that his speech was protected by academic freedom was rejected because it failed to "advance[] an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.* at 1189. Unlike Dambrot's motivational use of the "N" word removed from any academic context, Hardy's in-class use of the objectionable word was germane to the subject matter of his lecture on the power and effect of language. Moreover, this and the other offensive words were suggested by the students in the context of the discussion, not gratuitously used by Hardy in an abusive manner.

Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of "public concern." *See* Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693, 702 (1990) (arguing that "[a] teacher's speech

both offers students ideas and arguments that may be very much a part of public debate and teaches students the process of rational discourse that allows them to participate meaningfully in public debate). Hardy's lecture on social deconstructivism and language, which explored the social and political impact of certain words, clearly meets this criterion. Although Hardy's in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern -- race, gender, and power conflicts in our society. *See, e.g., Bonnell*, 241 F.3d at 816 (holding that "the subject of profane classroom language which precipitates a sexual harassment complaint lodged against the instructor . . . involves a matter of public import"); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (holding that a law school professor's "speech advocating the legalization of marijuana, criticizing national drug-control policy, and debating civil disobedience on its face implicates matters of public concern").

Hardy has thus satisfied the first prong of the two-part test set forth in *Pickering*. We therefore turn to the second prong, balancing Hardy's right to speak on a matter of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Although the district court's order did not detail its analysis under the *Pickering* balancing test, it found no evidence that "Hardy's speech was having a negative impact upon [the school's interest in] efficiency."

Hardy claims that his right to free speech and academic freedom outweigh the College's pedagogical interests in restricting a teacher's in-class discussion. Green and Besser maintain that because Hardy's speech was "sexist and racially derogatory," it warranted no constitutional protection. In the alternative, they argue that the College's legitimate interests in avoiding the disruption caused by

Hardy's actions and the potential for further disruption as a result of Reverend Coleman's involvement, as well as the need to control course curriculum and the pedagogical methods of the College's instructors, should defeat Hardy's speech interests.

In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools. As the Supreme Court proclaimed more than thirty years ago:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (internal citations and quotation marks omitted). The Court has long recognized that educational institutions occupy a unique place in First Amendment jurisprudence. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that "the unmistakable holding of this Court for almost 50 years" has been that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students"); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our society will stagnate and die.").

In light of these precedents, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. *See Scallet v. Rosenblum*, 911 F.Supp.

999, 1013-14 (W.D. Va. 1996) ("To suggest that the First Amendment, as a matter of law, is never implicated when a professor speaks in class, is fantastic."). This circuit, following Supreme Court direction, has similarly held that a teacher's in-class speech deserves constitutional protection. *See Bonnell*, 241 F.3d at 823 (holding that "a professor's rights to academic freedom and freedom of expression are paramount in the academic setting"); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (holding that the "First Amendment's protection of academic freedom" applies to teachers' in-class discussions).

We next focus on the College's interest in promoting efficiency in the educational services that it provides and in avoiding disruption to its operations. *Pickering* counsels that courts should consider whether an employee's comments meaningfully interfere with the performance of his duties or with the employer's general operations, undermine a legitimate goal or mission of the employer, create disharmony among coworkers, undercut an immediate supervisor's discipline over the employee, or destroy the relationship of loyalty and trust required of confidential employees. *See Pickering*, 391 U.S. at 569-70; *see also Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir. 1994) (denying the defendants' qualified immunity claims because "no reasonable official . . . could conclude that [the state's interest in preventing workplace disruption] outweighed Williams' interest in speaking freely on matters of political patronage and political corruption").

The discussion of the offensive words at issue was limited to a single lecture in Hardy's class. Despite the presence of nine African-Americans and one student of Asian descent, only one student objected. Hardy continued teaching his courses throughout the semester without any conflict, and all of his students but the one in question provided positive

feedback on his classroom instruction. There is no indication that the lecture undermined Hardy's working relationship within his department, interfered with his duties, or impaired discipline.

As noted earlier, the speech did have the effect of creating disharmony between Hardy and the College administrators, as evidenced by the contentious July 1998 meeting between Besser and Hardy and by the College's decision not to renew his contract. *Pickering* counsels, however, that a school's interest in limiting a teacher's speech is not great when those public statements "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572-73.

Green and Besser, however, rely on *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), to support their assertion that the College had an absolute right to evaluate Hardy's method of instruction. In *Hetrick*, this court found that no First Amendment interests were implicated when a state university did not renew the contract of a nontenured professor because her pedagogical style and teaching methods did not conform to the university's standards. *See id.* at 708. But *Hetrick* is easily distinguishable because the district court had made significant findings of fact related to the administration's dissatisfaction with Hetrick's teaching methods and ability. Numerous students had complained about "their inability to comprehend what she was attempting to teach them or what was expected of them." *Id.* at 706. Significantly, the court noted that had Hetrick been able to "adequately corroborate" her claim that the nonrenewal was based on statements made in class related to the Vietnam War and the military draft, relief might have been proper. *See id.* at 708.

As further justification for Hardy's termination, Green and Besser point to the potential disruption in school operations and enrollment that might have occurred had Reverend Coleman become more involved in the matter. The Supreme Court, however, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), pronounced that a function of the First Amendment "is to invite dispute.... Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment." *Id.* at 4 (internal citation omitted).

Twenty years later, in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508-09 (1969), the Court echoed *Terminiello*'s rationale in rejecting a school district's argument that the wearing of black armbands by some of the students might provoke a disturbance. The Court stated:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.... Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans.

Id. at 508-09 (internal citation omitted).

The alleged circumstances surrounding Hardy's termination appear to present a classic illustration of "undifferentiated fear" of disturbance on the part of the College's academic administrators. Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and

Besser become interested in the subject matter of Hardy's lecture. Just like the school officials in *Tinker*, Green and Besser were concerned with "avoid[ing] the discomfort and unpleasantness that always accompany" a controversial subject. *Id.* at 509. On balance, Hardy's rights to free speech and academic freedom outweigh the College's interest in limiting that speech. Hardy, therefore, has satisfied both prongs of the *Pickering* test in successfully alleging a First Amendment violation by a public employee.

2. Qualified immunity defense

Green and Besser next argue that they are entitled to qualified immunity because reasonable school officials could have disagreed about whether, and to what extent, Hardy's classroom speech was protected by the First Amendment. As discussed above, our review is limited to whether, in light of clearly established law, it was objectively reasonable for Green and Besser to believe that not renewing Hardy's contract in retaliation for his in-class speech was lawful. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

There is no doubt that the right allegedly violated in this case, based on the freedom of speech protected by the First Amendment, is one of our most fundamental and established constitutional rights. For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation "that cast a pall of orthodoxy" over the free exchange of ideas in the classroom. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Bd. of Regents v. Roth*, 408 U.S. 564, 574-75 (1972); *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Despite this overwhelming precedent, Green and Besser argue that the right was not clearly established because no court had specifically addressed

whether a public university could decline to renew a contract based solely on a professor's in-class use of "sexist and racially derogatory language."

Six years ago, however, this court in *Dambrot* held that "[t]he linchpin of the inquiry . . . for both public concern and academic freedom [is] the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995). The court then cited with approval the Seventh Circuit's determination in *Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990), that "[t]he purpose of the free-speech clause . . . is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions--scientific, political, or aesthetic--to an audience whom the speaker seeks to inform, edify, or entertain." *Id.* at 1250-51 (internal citation and quotation marks omitted). Moreover, it is "the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment." *Id.* at 1251.

The *Dambrot* court then distinguished the coach's motivational use of the "N" word with the speech of two professors who had made racially derogatory remarks. Such speech by the professors, however repugnant, had as its purpose the influencing of public opinion and was therefore constitutionally protected. *See Dambrot*, 55 F.3d at 1189. Finally, the court emphasized that Dambrot's "position as coach is somewhat different from that of the average classroom teacher . . . whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline." *Id.* at 1190. Given this court's indepth analysis of the protections available to one using the "N" word in an academic context, reasonable school officials should have known that such speech, when

it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.

Green and Besser next claim that the district court erred when it failed to consider a "fact-specific approach" to the issue of whether they were entitled to qualified immunity. In support of this argument, they point to what would indeed amount to the College's legitimate pedagogical interests in controlling its course curriculum and evaluating the teaching methodology used in its classrooms. They fail to acknowledge, however, that whether these factors entered into their decision not to renew Hardy's contract remain in dispute. Hardy has alleged that it was purely his classroom speech that motivated the employment decision. Green and Besser are now attempting to transform these factual issues into the legal question of objective reasonableness. Due to the parties' competing versions of the facts, however, these are issues that must be considered by a factfinder when weighing the merits of Hardy's retaliation claim. As such, they are inappropriate for consideration on interlocutory appeal. *See Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998) (dismissing the appeal "because there is clearly a factual dispute at the heart of the qualified immunity issue").

Assuming that Green and Besser retaliated against Hardy based upon the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable. Green and Besser, however, may defend against Hardy's claim by presenting proof that his contract was not renewed for permissible academic reasons, but that defense involves a disputed issue of material fact that cannot be resolved at this time.

IV. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX B

[Filed December 15, 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

MEMORANDUM OPINION

This matter is before the Court on the Motion to Dismiss filed by the Defendants, Jefferson Community College, the University of Kentucky, Kentucky Community and Technical College System, (collectively, "JCC"), Richard Green, and Mary Pamela Besser. Defendants' motion asserts that the claims of the Plaintiff, Kenneth E. Hardy, should be dismissed on a number of grounds. Plaintiff filed a response, and Defendants filed their reply. Plaintiff has sought leave to file a Sur-Reply. An examination of Plaintiff's proposed Sur-Reply demonstrates that it raises nothing dispositive of the issues before this Court. Thus, for that reason, and to bring the pleadings on this motion to a close, the Motion for Leave to File a Sur-Reply will be denied.

Plaintiff had also filed a Motion to Strike material in some of Defendants' pleadings. This Court denied that motion by its Order of November 22, 1999. Plaintiff filed a Motion to Amend, Alter, or Vacate that ruling on the basis that it was not afforded sufficient time to file a reply. An examination of Plaintiff's proposed reply reveals nothing within it that would change this Court's decision. In addition, the core of the dispute in Plaintiff's motion concerns whether affidavits submitted by Plaintiff were properly obtained. None of the affidavits submitted by Plaintiff or Defendants will be considered by this Court in making its ruling upon the Motion to Dismiss. Accordingly, the Motion to Amend, Alter or Vacate will be denied.

FACTS

In considering Defendants' Motion to Dismiss, all factual allegations contained in Plaintiff's Complaint must be accepted as true. The motion should be denied unless it can be established beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Thompson v. Superior Fireplace Co.*, 931 F.2d 372, 373 (6th Cir. 1991). Accordingly, the following facts are Plaintiff's version of the events that form that basis of his claims.

Defendant JCC hired Hardy in 1995 as an adjunct instructor in their communications program. Throughout subsequent years, JCC hired Hardy each semester on a continuous basis, with a separate contract for each semester. In May of 1998, Hardy was informed that he would teach three courses in the Fall 1998 semester, but did not at that time, or any time thereafter, sign a contract to teach for any semester after the Summer 1998 semester. During the Summer 1998 semester, Hardy taught Introduction to Interpersonal Communication. On July 16, during a lecture on language and social constructivism, the class discussed and analyzed various "socially controversial words,"

including the racial epithet, "nigger." One of the students, an African-American, complained about the use of some of these words, both to Hardy and to his superiors.

According to Hardy, Defendant JCC, Defendant Richard Green, President of JCC, and Defendant Mary Pamela Besser, Acting Dean of Academic Affairs for JCC, ultimately refused to renew Hardy's contract to teach in the Fall 1998 semester because of the use of the "socially controversial words," even though the use of the words was not directed at any individual but rather in a general academic discussion about their impact. Hardy furthermore alleges that this decision to not renew his contract came after the intervention of Rev. Louis Coleman, a local African-American political activist. Hardy alleges Coleman's involvement triggered fears that enrollment of African-Americans at JCC would decline if the dispute was not resolved to the satisfaction of the complaining student and Rev. Coleman.

DISCUSSION

In Count I of the Complaint, Hardy alleges that the nonrenewal of his contract violated his First Amendment, due process, and equal protection rights under federal law. In Count II, he alleges the Defendants conspired to do an unlawful act against him in violation of state law. Count III is a state law claim for defamation against Defendant Besser. Count IV is a state law claim against Defendants Besser and Green for tortious interference with Hardy's and JCC's continuing business relationship. Count V is a claim for breach of contract. Defendants have moved for dismissal of all claims on a variety of grounds.

Eleventh Amendment and Sovereign Immunity

Defendants' first defense is that Plaintiff's claims against JCC, as well as Green and Besser in their official capacity, are barred by the Eleventh Amendment and sovereign

immunity because Defendant JCC is an arm of the state of Kentucky. The Supreme Court has recently affirmed that the Eleventh Amendment prohibits suits in federal court by citizens against a state unless a) Congress has authorized a suit in the exercise of its power to enforce the Fourteenth Amendment, or b) a State has voluntarily waived its sovereign immunity and consented to suit. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999). The immunity extends to state officials acting in their official capacity, except for claims for prospective injunctive relief. *Williams v. Kentucky*, 24 F.3d 1526, 1544 (6th Cir. 1994).

Plaintiff's federal claims are brought pursuant to 42 U.S.C. § 1983, and it is well-established that Congress did not abrogate state sovereign immunity in suits under that statute. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). Nor does Plaintiff claim that the state of Kentucky has waived its sovereign immunity, established by Section 231 of the Kentucky Constitution, as to either Plaintiff's federal or state claims. Therefore, if JCC is an arm of the state of Kentucky, Plaintiff's claims against JCC and Besser and Green in their official capacity must be dismissed, with the exception of Plaintiff's claims under 42 U.S.C. § 1983 which request only prospective injunctive relief and not monetary damages.

In determining whether JCC is an arm of the state of Kentucky, and thus whether Eleventh Amendment immunity should apply, the most important factor is whether a judgment, if obtained, would be paid out of the state treasury. *Ritter v. University of Mich.*, 851 F.2d 846, 850 (6th Cir. 1988). The Court of Appeals for the Sixth Circuit has already determined that the University of Louisville and the University of Kentucky, two public postsecondary education systems within Kentucky, are arms of the state and are entitled to sovereign immunity. *Cowan v. University of*

Louisville, 900 F.2d 936 (6th Cir. 1990); *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir. 1993). KRS 164.001(15) includes the Kentucky Community and Technical College System, of which JCC is a part, within the class of "postsecondary education systems." Defendants have not, however, presented any evidence that JCC is funded by the state of Kentucky, and thus a judgment against it would be paid out of the state treasury. Accordingly, the Motion to Dismiss Plaintiff's Complaint on the basis of the Eleventh Amendment and sovereign immunity will be deferred at this time. Plaintiff will be given an opportunity to supplement its motion with evidence sufficient to support a finding that Defendant JCC is entitled to Eleventh Amendment protection.

Qualified Immunity

Defendants Besser and Green assert that they are entitled to qualified immunity from Plaintiff's 42 U.S.C. § 1983 action. When a defendant raises qualified immunity, the Court must examine Plaintiff's Complaint to see if Plaintiff has alleged facts which would show that the conduct of the Defendants violated a clearly established constitutional right of which a reasonable person should have known. *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987).

In his Complaint, Plaintiff alleges that Defendants violated his right of free speech under the First Amendment, his right to due process, and his right to equal protection. Plaintiff does not allege any facts anywhere in his pleadings to support a claim for violation of his equal protection rights. Accordingly, Defendants' motion to dismiss Plaintiff's equal protection claim will be granted. However, Plaintiff has plead sufficient facts to support a claim that his free speech rights were violated, and that those rights were clearly established.

In his First Amendment claim, Plaintiff asserts that JCC terminated his employment because of a class in which Hardy led a discussion concerning "socially controversial words," including the racial epithet "nigger." Defendants assert that Hardy has no constitutional right to use such vulgarity in the classroom, and that Defendants had the right to terminate him for using such language.

It is clearly established that a government employee retains his First Amendment right to comment on matter of public concern, and his employer may not retaliate against him for exercise of that right. *Connick v. Myers*, 461 U.S. 138, 140 (1983). This includes untenured college professors whose contracts are not renewed, such as Hardy. *Perry v. Sindermann*, 408 U.S. 593 (1972). In determining whether speech is protected, the Court first determines whether the speech touches upon a matter of public concern. If it does, the employee's right to comment upon a matter of public concern is weighed against the interest of the State in promoting the efficiency of the services it provides through its employees. *Connick v. Myers*, 461 U.S. 138 (1983).

The Supreme Court has defined speech commenting on a matter of public concern as "relating to any matter of political, social, or other concern to the community." *Id.* at 146. Further, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. At this stage of the instant litigation, the Court does not have a record before it, but in ruling upon the motion to dismiss, we must assume the facts alleged by Hardy to be true.

Hardy alleges that the use of the racial epithet was in an academic context and setting and was done in order to analyze the impact of these words upon societal relations. We find that this use could touch upon a matter of public concern. Unlike the plaintiff in *Dambrot v. Central Michi-*

gan University, 55 F.3d 1177 (6th Cir. 1993), Hardy alleges that he was not directing the words at any of his students or that it was done merely to motivate them. Rather, Hardy alleges that his speech was a comment upon a matter of public concern, i.e. the impact of socially controversial words upon society. Hardy's right to free speech does have to be weighed against the school's interest in promoting the efficiency of its services, but at this stage of the litigation, the Court has no evidence before it that Hardy's speech was having a negative impact upon such efficiency.

Defendants also assert that Hardy's alleged constitutional rights were not clearly established because no binding precedent exists saying that a teacher has the right to use vulgarity in his teaching methods. However, the right of public employees to comment on matters of public concern has been clearly established by Supreme Court precedent for many years. A binding precedent with identical facts does not have to exist in order for a constitutional right to be clearly established. Accordingly, the Motion to Dismiss Plaintiff's First Amendment claims under 42 U.S.C. § 1983 against Defendants Besser and Green will be denied.

Plaintiff's due process claims, however, will be dismissed because Hardy did not have a property interest in his continued employment at JCC. JCC did not terminate Hardy, it chose not to renew his contract. Hardy has not alleged that he was entitled to any procedural due process prior to the nonrenewal of his contract. Whether his procedural due process rights were violated during the course of the last semester that he taught at JCC is irrelevant, as his employment for that semester was not terminated. Because Hardy has not alleged that the Defendants failed to follow any procedures that were necessary prior to nonrenewal of his contract, the Motion to Dismiss the procedural due process claim will be granted.

State Law Claims

Defendants have also moved for dismissal of Hardy's state law claims of conspiracy, defamation, tortious interference with a contractual relationship, and breach of contract. The Motion to Dismiss will be granted in part and denied in part as to the state law claims.

Defendants assert Hardy has not alleged any unlawful act as required to support a conspiracy claim. To the contrary, if it is shown that Defendants retaliated against Hardy for exercise of his constitutional rights, then that would satisfy the requirement of an unlawful act. Accordingly, the Motion to Dismiss the conspiracy claim will be denied.

Hardy's defamation claim fails to survive Defendants' Motion to Dismiss. Defendant Besser made the allegedly defamatory statements at a Council meeting, stating that the issue regarding Plaintiff had nothing to do with academic freedom, rather "other factors," and specifically, "legal issues" were involved. Hardy asserts that this intimated that he was "in some sort of legal trouble." The Court finds as a matter of law that no reasonable person could find the statements of Defendant Besser to be defamatory. Accordingly, the Motion to Dismiss Hardy's defamation claim will be granted.

Hardy's claim for tortious interference with a contractual relationship fails because Hardy had no contract with which to interfere. Defendants honored Hardy's contract to teach during the Summer Semester, 1998. Hardy had no contract to teach any subsequent semesters. Therefore, the Motion to Dismiss Hardy's claim for tortious interference with a contractual relationship will be granted.

If Defendants present evidence to this Court satisfying the burden of demonstrating that Defendant JCC is entitled to sovereign immunity, then Hardy's breach of contract claim must be dismissed. The state of Kentucky's limited waiver

of sovereign immunity allowing breach of contract claims to be brought in state court would not allow this Court to exercise jurisdiction over that claim on the basis of its supplemental jurisdiction under 28 U.S.C. § 1367.

CONCLUSION

Defendants' Motion to Dismiss will be granted in part and denied in part by separate order.

This 15th day of December, 1999.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX C

[Filed December 15, 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

ORDER

For the reasons set forth in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. Defendants' Motion to Dismiss on the basis of sovereign immunity and the Eleventh Amendment is **DEFERRED** at this time. Defendants have 15 days from the date of this Order to supplement their motion only as to the issue of whether a judgment against Defendant JCC would be paid out of the state treasury.

2. Defendants' Motion to Dismiss as to Hardy's 42 U.S.C. § 1983 claim for violation of his First Amendment rights is **DENIED**.

3. Defendants' Motion to Dismiss as to Hardy's claims for violations of his procedural due process and equal protection rights is **GRANTED**.

4. Defendants' Motion to Dismiss as to Hardy's claims for conspiracy is **DENIED**.

5. Defendants' Motion to Dismiss as to Hardy's claims for defamation and tortious interference is **GRANTED**.

6. Defendants' Motion to Dismiss as to Hardy's claim for breach of contract is **DEFERRED**.

7. Plaintiff's Motions to File a Sur-Reply and to Amend, Alter or Vacate are **DENIED**.

IT IS SO ORDERED this 15th day of December, 1999.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX D

[Filed January 26, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Alter or Amend, Defendants' Motion to Dismiss, and Defendants' renewed Motion to Stay Discovery. Defendants' Motion to Alter or Amend asks this Court to reconsider both our Order of December 15, 1999, granting in part, deferring in part, and denying in part Defendants' Motion to Dismiss and our Order of December 15, 1999, granting a stay of discovery with the exception of the deposition of Rev. Louis Coleman. Also before the Court is Defendants' Motion to Dismiss on the basis of sovereign immunity, which we deferred ruling upon in our Order of December 15, 1999.

In that Order, this Court gave the Defendants an opportunity to supplement their Motion to Dismiss with evidence sufficient to support a finding that a judgment against Defendant Jefferson Community College ("JCC") would be paid out of the state treasury. Defendants have presented evidence to this Court that, like other state institutions, any judgment against JCC would be paid with state funds. Furthermore, JCC falls under the same statutory scheme as the University of Louisville and the University of Kentucky. The Court of Appeals for the Sixth Circuit has already found that under Kentucky's statutory scheme, both the University of Louisville and the University of Kentucky are "arms of the state" and entitled to Eleventh Amendment protection. *Cowan v. University of Louisville*, 900 F.2d 936 (6th Cir. 1990); *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir. 1993). We likewise find that Jefferson Community College is also an arm of the state. Therefore, all claims against JCC and Defendants Richard Green and Pamela Besser in their official capacity must be dismissed on the basis of Eleventh Amendment immunity, with the exception of those claims asking for prospective injunctive relief.

Motion to Alter or Amend

Defendants move to alter or amend those portions of the Orders of December 15, 1999, which denied qualified immunity to Defendants Green and Besser in their individual capacity and which permitted discovery to go forward as to Rev. Louis Coleman. For the same reasons we denied Defendants' Motion to Dismiss, we will deny Defendants' Motion to Alter or Amend as well.

Defendants acknowledge that Plaintiff has a constitutional right to free speech under the First Amendment. They assert, however, that Defendants Green and Besser are entitled to qualified immunity because the right to free speech *in the classroom setting* is not clearly established. We not only find this to be a distinction without a differ-

ence, but we also note that a university teacher has a constitutional right to academic freedom under the First Amendment. *See Healy v. James*, 408 U.S. 169 (1968). "[T]he purpose of academic freedom is to preserve the 'free marketplace of ideas' and protect the individual professor's classroom method from the arbitrary interference of university officials." *Parate v. Isibor*, 868 F.2d 821, 830 (6th Cir. 1989). The Supreme Court has long recognized that, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy v. James*, 408 U.S. 169, 180-181 (1968) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Thus, Plaintiff has properly alleged that his employment as a teacher at Defendant JCC ended because of his exercise of his constitutional rights, specifically, his rights to free speech and academic freedom. Whether the facts of the case will support those allegations remains to be seen, but at this stage of the litigation, Defendants have not demonstrated that they are entitled to qualified immunity as a matter of law.

Defendants have also asked this Court to reconsider its denial of the Motion to Dismiss Plaintiff's conspiracy claims, on the basis that Defendants did not violate Plaintiff's constitutional rights. As we have not dismissed Plaintiff's First Amendment claims, the Motion to Alter or Amend the denial of Defendants' Motion to Dismiss Plaintiff's conspiracy claims will be denied as well.

Discovery

Defendants again ask this Court to stay all discovery in this case on the basis that the issue of qualified immunity is still pending. We have now resolved the issue of Defendants' qualified immunity, both on the Motion to Dismiss

and the Motion to Alter or Amend. There being no further reason for delay at this time, the partial stay of discovery will be lifted, and all discovery may proceed in this case, including the deposition of Rev. Louis Coleman.

This 26th day of January, 2000.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX E

[Filed January 26, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

ORDER

For the reasons set forth in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Dismiss the Defendant Jefferson Community College and the Defendants Green and Besser in their official capacity is **GRANTED**, with the exception of Plaintiff's claims for prospective injunctive relief. The Motion to Alter or Amend and the Motion to Stay Discovery made by the Defendants is **DENIED**. All discovery may proceed at this time.

IT IS SO ORDERED this 26th day of January, 2000.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX F

[Filed February 1, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-477-S

KENNETH E. HARDY,
Plaintiff,

v.

JEFFERSON COMMUNITY COLLEGE, et al
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motions to Reconsider this Court's Order of December 15, 1999, made by the Plaintiff, Kenneth E. Hardy. Hardy's first Motion to Reconsider (Docket #33) requests that this Court lift its partial stay of discovery. As this Court has already done so in its Order of January 26, 2000, **IT IS HEREBY ORDERED AND ADJUDGED** that this Motion to Reconsider is **DENIED** as moot. In his second Motion to Reconsider (Docket #34), Hardy requests that this Court reconsider the portions of its Memorandum Opinion and Order that:

1. held that Hardy was not terminated;

2. dismissed Hardy's claim for violation of his due process rights;

3. dismissed Hardy's claim for tortious interference with a contractual relationship.

It is undisputed by the parties that the written contract between Hardy and Defendant Jefferson Community College was honored by the college. Hardy completed teaching his class in the summer semester, 1998, and was paid accordingly. It is also undisputed that Hardy never had a written contract to teach in any subsequent semester. Hardy asserts, however, that he had an oral contract to teach in the fall semester, and this is the basis for his motion to reconsider.

This Court has already determined that Defendant Jefferson Community College is an arm of the state of Kentucky, and that the Eleventh Amendment prohibits a suit against a state by one of its citizens unless it has waived its sovereign immunity. The state of Kentucky has waived its sovereign immunity only for *written* contracts. KRS 45A.245(1). An oral contract with the state of Kentucky is void because it is against public policy, *All-American Movers v. Kentucky ex rel. Hancock*, 552 S.W.2d 679, 681 (Ky. Ct. App. 1977), and "a void transaction has no legal force or effect." *Noble v. National Mines Corp.*, 774 F.2d 144, 147 (1985). Hardy cannot base his claims upon an oral contract which has no legal force or effect.

Furthermore, Kentucky courts have not recognized a cause of action for tortious interference against a defendant for interfering with its own contractual relationship. *CMI, Inc. v. Toximeters*, 918 F. Supp. 1068 (W.D. Ky 1995). Because President Green and Dean Besser are agents of Jefferson Community College, Plaintiff's cause of action alleges that Jefferson Community College interfered with its

own contractual relationship. As no Kentucky court has recognized this tort, we decline to do so as well.

For all of the above reasons, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Reconsider (Docket #34) is **DENIED**.

IT IS SO ORDERED this 1st day of February, 2000.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX G

[Filed October 4, 2001]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5198

KENNETH E. HARDY,
Plaintiff-Appellee,

v.

JEFFERSON COMMUNITY COLLEGE, ET AL.,
Defendants,

MARY PAMELA BESSER, ET AL.,
Defendants-Appellants.

ORDER

BEFORE: KEITH, NORRIS, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were

fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk